IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

HASKELL E. SUTTON v. WACKENHUT SERVICES, INC.

Direct Appeal from the Circuit Court for Anderson County
No. A3LA0227 Honorable Donald R. Elledge, Judge

Filed January 31, 2007

No. E2006-00427-WC-R3-CV - Mailed December 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court concluded that the employee had sustained a fifty-five (55) percent permanent, partial disability to the binaural hearing as a result of work related exposure to loud weapon noise. On appeal, the employer contends that the trial court erred in (1) determining that the action was not barred by the applicable statute of limitations, (2) determining that the last injurious injury rule was inapplicable and (3) awarding benefits based upon an excessive permanent, partial disability rating. The employee contends that the trial court's award should be upheld. We reverse the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3) (2005) Appeal as of Right; Judgment of the Circuit Court is Reversed.

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH CHIEF JUSTICE WILLIAM M. BARKER, PRESIDING AND CHANCELLOR TELFORD E. FORGETY, JR., SPECIAL JUDGE, joined.

Joshua A. Wolfe, LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, P.L.L.C., 180 Market Place Blvd., Knoxville, TN, 37922, for the Appellant, Haskell E. Sutton.

Darren E. Ridenour, RIDENOUR & RIDENOUR, P. O. Box 530, Clinton, TN, 37717-0530, for the Appellee, Wackenhut Services, Inc.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The employee, Haskell Eugene Sutton, was 63 years of age at the time of trial. In 1981, Mr. Sutton became employed by Wackenhut Services, Inc. as a security police officer. In connection with his work, the employee maintained various positions, including membership on a tactical response team. Mr. Sutton's work duties required considerable training with loud weaponry. During each training session, Mr. Sutton would discharge between 500 and 600 rounds of ammunition.

When first employed, the claimant was provided no hearing protection. As a precaution, the employer suggested that Mr. Sutton use a cigarette filter or spent brass casing. According to the testimony of the claimant, he in fact did occasionally use a spent .38 casing for protection in each ear during training sessions.

In addition to his participation with the tactical response team, Mr. Sutton was a member of the employer's competitive shooting team. He won a Tennessee championship and finished second in a national competition involving fifty-nine DOE installations.

By reason of noticeable hearing loss and constant ringing in his ears, the employee filed a complaint seeking benefits under the workers' compensation laws for the State of Tennessee on April 21, 2003. Mr. Sutton continued to be employed by Wackenhut Services, Inc. until January 2005, when he retired from his employment. Prior to his departure, Mr. Sutton was working in the capacity of a performance testing specialist. Following his retirement, Mr. Sutton has continued to operate his own handgun instruction business. The parties stipulated that at the time of trial, the employee's impairment rating was 4.3 percent to the binaural hearing.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we

may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. STATUTE OF LIMITATIONS

The employer argues that the employee's claim for benefits was untimely filed and is therefore barred by the applicable statute of limitations. The statutory limitation of time for claims and actions brought under the Tennessee Workers' Compensation Act is controlled by T.C.A. 50-6-203(a) which provided, prior to the 2004 amendment, as follows:

> (a) The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided, that if within the one-year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, except in those cases provided for by § 50-6-230. Where a workers' compensation suit is brought by the employer or the employer's agent and the employer or agent files notice of non-suit of the action at any time on or after the date of expiration of the statute of limitations, either party shall have ninety (90) days from the date of the order of dismissal to institute an action for recovery of benefits under this chapter.

An exception exists for an injury which gradually develops over time. Tennessee courts recognize that "the running of the statute of limitations and of the time for giving notice of an injury is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained", Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253 (1987). "The rule is well-established that where the injury is in the nature of a continuous and gradual deterioration over time, and the severity of the injury is not immediately known, the statute of limitations runs from the date the severity of the injury first becomes known and not from the date of the onset of the gradual injury", Blair v. Inland Container Corp., 1991 W.L. 231114(S.Ct. 1991); Osborne v. Burlington Industries, Inc., 672 S.W.2d 757 (1984). Therefore, the statute commences on the date when an employee's disability would have manifested itself to a person of reasonable diligence, Banks v. St. Francis Hosp., 697 S.W.2d 340 (1985). Once the claimant becomes reasonably aware that an injury is serious or work related, the statutory notice must be provided to the employer, Lyle v. Exxon Corp., 746 S.W.2d 694 (1988).

Mr. Sutton testified that in 1985, he was involved in a work-related drill which resulted in a concussion grenade discharging close to his ear and face. The concussive force knocked him backwards. Consequently, Mr. Sutton was without hearing in his right ear for about three days.

The evidence further supports a finding that the claimant first learned that his hearing loss was work related in the mid-1990s. When questioned on direct examination with reference to when

he first became aware that his hearing loss was work related, the following response was given:

> *A. I would say it was probably in the '90s, along in the '90s, somewhere in the middle '90s.*

The employee further explained that Pace International contacted him requesting his attendance at a program which it was offering. While present, Mr. Sutton was provided a complete examination, during which he was instructed that he had "severe, severe hearing loss". Mr. Sutton did not indicate when Pace International provided this information.

With reference to Mr. Sutton's becoming aware of work related hearing loss in the mid 1990s, the employee explained that his condition advanced to a level that he could no longer use a telephone with his right ear and switched to using his left ear. In response to an interrogatory requesting how his injury by accident occurred, Mr. Sutton provided the following answer:

> *ANSWER: A portion of Plaintiff's job duties was handling telephone conferences. On or about 1994 or 1995, Plaintiff began to notice hearing loss in his right ear when on the phone. Plaintiff was required to take yearly physical exams for employer and was notified each time of hearing loss.*

Clearly Mr. Sutton was aware of the inadequacy of using spent shell casings for hearing protection as evidenced by the following exchange during continued direct examination:

> *Q. Now, how would you compare that to your hearing protection that you use as an instructor?*
>
> *A. That I use now?*
>
> *Q. Yes, sir.*
>
> *A. You can't compare it. There's no comparison. I mean, it's like having nothing in your ears with the -- with the casings.*

Having conducted an independent examination of the record, this panel concludes that the evidence preponderates against the trial court's determination that the employee's claim was not barred by the applicable statute of limitations. The evidence instead supports a conclusion that Mr. Sutton's hearing loss manifested itself in the mid 1990s. At that time, by reasonable care and diligence it was discoverable and apparent that an injury compensable under the Workers' Compensation Act had been sustained. Certainly, Mr. Sutton's disability would have manifested itself to a person of reasonable diligence.

This panel determines that Mr. Sutton failed to timely file his claim for benefits and therefore, his claim is barred by the application of T.C.A. 50-6-203(a) (1999). By reason of this

conclusion, a review of the remaining issues is unnecessary and pretermitted. The employee's complaint shall be dismissed.

IV. CONCLUSION

The judgment of the trial court is reversed. Costs of the appeal are taxed to the employee and his surety. This case is remanded for any further proceedings which may be appropriate.

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Thomas R. Frierson, II, Special Judge

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Haskell E. Sutton, and his surety for which execution may issue if necessary.